(1)

NO. 90-877

IN THE

Supreme Court of the United States

October Term, 1990

No. _____

WILLIAM DEE,
ROBERT LENTZ,
and
CARL GEPP

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Did the United States Court of Appeals for the Fourth Circuit err in holding that Petitioners, as Federal government officials or employees, were not immune from Federal criminal prosecution for alleged violations of the Resource Conservation and Recovery Act?

II. Did the United States Court of Appeals for the Fourth Circuit err in holding that Petitioners demonstrated the requisite intent to support criminal convictions for violations of the Resource Conservation and Recovery Act?

PARTIES TO THE PROCEEDING

The only parties to the proceeding in the court whose judgment is sought to be reviewed (United States Court of Appeals for the Fourth Circuit) are named in the caption here: William Dee, Robert Lentz, and Carl Gepp, as Petitioners, and the United States of America, as Respondent.

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United States v. Dee, 912 F.2d 741, 31 ERC 1953 (4th Cir. 1990).

GROUNDS FOR JURISDICTION

The decision of the Court of Appeals for the Fourth Circuit was issued on September 4, 1990.

No motion for rehearing was filed. There have been no motions submitted to this Court for extension of time within which to file this Petition for Writ of Certiorari.

Jurisdiction to conduct the requested review is conferred upon this Honorable Court by 28 U.S.C. Sec. 1254.

STATUTES INVOLVED IN THIS CASE

42 U.S.C. Sec. 6003(15)

42 U.S.C. Sec. 6928(d)

42 U.S.C. Sec. 6961

The pertinent text of each statute is contained in the Appendix to this Petition [see separate volume].

STATEMENT OF THE CASE

This matter involves a trial of more than seven weeks on a five-count indictment issued June 28, 1988 against Petitioners William Dee, Robert Lentz, and Carl Gepp. The indictment was filed in the United States District Court for the District of Maryland.

Petitioners each held positions within an organization known as the Munitions Directorate of the Chemical Research, Development, and Engineering Center (CRDEC) at the Aberdeen Proving Grounds, operated by the United States Army in Harford County, Maryland.

The indictment involved a portion of the Aberdeen grounds known as the "Pilot Plant," where various sensitive chemical weapons projects were conducted. The indictment charged

violations of the Resource Conservation and Recovery Act (RCRA) and of the Clean Water Act. These charges related to a three-year period from mid-1983 to mid-1986. Count One alleged illegal storage and disposal of dimethyl polysulfide, also known as NM. Counts Two, Three and Four alleged illegal storage, treatment or disposal of dozens of chemicals at various times and places. Count Five alleged a criminal violation of the Clean Water Act relating to an acid leak in September 1985.

A superseding indictment was issued November 29, 1988, which added, eliminated or redefined various chemicals described in Counts Two through Five. A motion to dismiss was filed September 2, 1988 and was answered

by the Government on September 16 (a reply memorandum by Petitioners was filed on September 30 with a further Government response on November 8).

The motion to dismiss pointed out the inapplicability of RCRA's criminal enforcement provisions against Petitioners. The motion stated the federal government and thus its employees are excluded from the RCRA definition of "person" and that RCRA waives sovereign immunity only for injunctive relief, making injunctive relief the only RCRA sanction against federal employees acting within their responsibilities.

The motion to dismiss was denied, after a hearing, on December 9, 1988. Notice of appeal was filed December 19, 1988. The United States Court of Appeals

for the Fourth Circuit held its consideration of that appeal until the conclusion of trial.

At trial before the United States District Court for the District of Maryland (John R. Hargrove, J.), the jury heard from more than 50 witnesses and were presented with more than 200 exhibits. On February 23, 1989, at the end of this exhaustive trial, the jury convicted Petitioners of various counts.

Petitioner William Dee was convicted of Count Four (storage and disposal of various chemicals at the Old Pilot Plant). Petitioner Robert Lentz was convicted of Count One (storage and disposal of dimethyl polysulfide), Count Three (treatment and disposal of chemicals in toxic neutralization systems at the Pilot Plant), and Count

Four (storage and disposal of certain chemicals at the Old Pilot Plant).

Petitioner Carl Gepp was convicted of Count One (storage and disposal of dimethyl polysulfide), Count Two (storage and disposal of chemicals for a project known as the Chemical Hazardous Response Information System (CHRIS) and other chemicals at the Pilot Plant), and Count Three (treatment and disposal of chemicals in neutralization systems).

None of the Petitioners was convicted of Count Five, the Clean Water Act charge relating to an approximately 200-gallon acid leak into a creek (Canal Creek) on the Proving Ground premises. This charge is thus not involved here.

On May 11, 1989, the United States District Court sentenced each Petitioner to three years' probation and 1,000

hours of community service. Appeal to the United States Court of Appeals for the Fourth Circuit was noted on May 17, 1989.

In their appeal, Petitioners raised several issues. Among them were crucial issues of immunity from prosecution and lack of criminal intent.

On September 4, 1990, the Fourth Circuit affirmed the convictions (United States v. Dee, 912 F.2d 741 (4th Cir. 1990)). The Court concluded there is no immunity from criminal prosecution for government employees acting for or on behalf of their federal agency. The Court also concluded that Petitioners had the requisite criminal intent to support their convictions.

Petitioners contend to this Court that the Fourth Circuit did not suffi-

sufficiently consider the immunity issue here. Neither did the Court carefully review the question of criminal intent, especially in view of the different approaches taken in the Circuits to criminal intent regarding RCRA.

Petitioners point out that these circumstances are quite unique. This is a rare instance of federal government employees criminally prosecuted for violations of federal hazardous waste laws. As such, Petitioners contend the entire facility, rather than individual actions, should be the focus here.

As to immunity, the issue involves: 1) whether immunity from criminal prosecution extends to federal government employees acting for or on behalf of their agency and acting within their official responsibilities and 2)

whether Congress in the present version of RCRA intended federal facilities, agencies, or employees to be exempt from criminal responsibility for alleged hazardous waste violations.

As to criminal intent, Petitioners also point to the unique nature of these circumstances. This is not a case of wholesale dumping of large-scale chemical wastes into a backyard stream, or of deliberate, considered action to evade hazardous waste requirements.

Petitioners were well-regarded employees of a neglected facility, in poor condition, which received little attention as to needed repairs and improvements while Petitioners were expected to comply with requirements concerning hazardous substances.

Further, these requirements were

characterized as safety rather than environmental concerns. No suggestion was made to Petitioners, nor were they aware, that possible criminal responsibility was involved.

The seven-week trial here encompasses more than 4,700 pages of transcript. Yet, regardless of the massive Government effort to obtain a conviction, and despite the conclusions of the Fourth Circuit, Petitioners contend that key aspects necessary to support the charges, including immunity and criminal intent, were never sufficiently resolved.

I. ORGANIZATIONAL REVIEW

The time period of the indictment, mid-1983 to mid-1986, relates to activities of Petitioners within their responsibilities at the Chemical

Research, Development, and Engineering Center (CRDEC), a large organization at the Aberdeen Proving Ground (APG), a 79,000-acre installation operated by the United States Army. Petitioners had obligations within one of CRDEC's nine directorates--the Munitions Directorate, which develops chemical agents and delivery systems for field troops.

The Munitions Directorate included a complex known as the "Pilot Plant" (building E5625), a four-story building built in the 1940s with several laboratories, where an array of sensitive projects were conducted. Also on the APG premises was a formerly-used building, known as the Old Pilot Plant (building E3640), which had been closed in 1978 by previous CRDEC managers.

The Aberdeen Proving Ground is the

"landlord" for more than 40 "tenants" each conducting their own operations. As "landlord," APG itself is ultimately responsible for base administrative operations, including environmental and hazardous waste programs.

The Chemical Research, Development, and Engineering Center (CRDEC) with its various directorates (including the Munitions Directorate in which Petitioners worked), is APG's largest "tenant." CRDEC has more than 1,300 employees and more than 100 different projects.

Within the Munitions Directorate of the CRDEC were various divisions and branches, including the Producibility, Engineering and Technology division. Within that division was a branch known as Process Technology.

Petitioner William Dee was chief of the Munitions Directorate of CRDEC. Petitioner Robert Lentz was chief of the Producibility, Engineering, and Technology division of the Munitions Directorate. Petitioner Carl Gepp was chief of the Process Technology Branch of the Producibility, Engineering, and Technology Division.

On the Pilot Plant premises were toxic neutralization sumps. These sumps were designed to neutralize waste chemicals and involved neutralizing the acid/base (pH) value of these chemicals so that the resulting fluid can be sent to a treatment facility within the APG.

One of the projects supported by the Pilot Plant was CHRIS (Chemical Hazardous Response Information System). The CHRIS project was commissioned by

the Coast Guard to obtain data on selected chemicals to formulate spill response plans.

Among other CRDEC Directorates is the Environmental Technology Directorate. Among its responsibilities is to ensure that CRDEC activities are planned and executed in an environmentally acceptable manner.

Another CRDEC directorate is Research and Development Engineering. Among its responsibilities is coordinating with APG for maintenance of CRDEC buildings. The duties of Environmental Management Office in the Engineering and Housing Directorate include obtaining and maintaining environmental permits and coordinating with federal and state agencies. Also, there was a special CRDEC Safety Office, reporting to CRDEC Deputy Commander. It was concerned

primarily with employee safety. And of note are two other APG tenant agencies: the United States Army Environmental Hygiene Agency (USAEHA) and the United States Army Technical Escort. The USAEHA provides guidance and support to Army installations in environmental hygiene and related areas. The United States Army Technical Escort is a special unit able to respond to hazardous chemical incidents at APG or elsewhere.

Environmental compliance, monitoring, and APG hazardous waste management for "tenants," including CRDEC therefore involved interlocking responsibilities of numerous offices, directorates, and special agencies. In addition, there was delay, neglect, confusion, paperwork, and failed communications as to the Pilot Plant.

It was no secret that the Pilot Plant (E5625) was old, in poor condition, and badly in need of repair. As structural problems worsened, and as the Pilot Plant increasingly became the target of environmental investigations and inspections from both inside and outside CRDEC and APG (beginning in September of 1985), there was a failure of those in authority at CRDEC and APG to take responsibility for its problems.

Among the myriad APG regulations was APG 200-2, "Waste Management at APG," updated in May of 1982 (but not substantially updated until 1989 despite major changes in RCRA in 1984). APG 200-2 required environmental compliance at APG, although its prime purpose was to identify waste disposal procedures. The Government claimed Petitioners knew the

full reach of that regulation. Yet individuals in authority during that period, including Brigadier Gen. James Klugh (CRDEC commander, January 1984 to July 1986) and Brigadier Gen. Peter Hidalgo (then Commander of the U.S. Army Toxic and Hazardous Materials Agency and later CRDEC commander--1986), were unfamiliar with or uncertain about it.

There were memoranda, inspections, documentation, and reports issued by the Safety Office and other offices on the Pilot Plant in 1983 and 1984, chiefly regarding safety issues, with generic references to environmental compliance. But not one witness testified that the Petitioners were ever put on notice of specific failures of environmental compliance at the Pilot Plant, let alone that criminal violations of

environmental laws were at stake.

In Pilot Plant operations, a chemical known as dimethyl polysulfide (NM) was used. It was a component of a binary chemical weapons project.

Several NM drums were stored at the Pilot Plant. Its poor condition was made dramatically obvious in September of 1983, when a portion of the roof collapsed, crushing some NM drums and requiring a response to the incident.

Several witnesses testified about NM clean up. Chemical removal procedures (known as "hard-card turn-ins") for the NM were initiated in August of 1984, but the APG waste removal contractor did not pick up the NM until March of 1986.

Throughout this time period and after, reports from outside consultant firms were commissioned by CRDEC, the

Army Corps of Engineers, and APG about the Pilot Plant and its condition. Various options were considered, such as restoring the present Pilot Plant or building a new facility. But no progress was ever ultimately made on these items in the bureaucracy of CRDEC, APG, the Department of Defense, or in Congress.

Numerous repair orders were submitted for the Pilot Plant. Yet they were rarely completed in a timely fashion or at all. Thus, the Pilot Plant deteriorated while its operations continued, notably a critical United States binary chemical weapons program. Petitioners performed their duties as far as possible in these conditions.

In May, 1983, various chemicals were moved from the Old Pilot Plant (E3640) to the Pilot Plant (E5625).

Witnesses told of allegedly improper or haphazard practices in the transfer or disposal of these chemicals.

However, these witnesses did not indicate that Petitioners conducted these activities themselves, or that Petitioners conducted these disposal activities with any criminal intent.

Much more attention was directed at the Pilot Plant in January to April of 1986 when a series of newspaper articles appeared about allegedly improper chemical storage and disposal activities at APG. The articles were prompted in part by the efforts of a Pilot Plant employee concerned about worker safety, who determined that CRDEC and APG authorities would not follow through on repair assurances.

After these articles appeared, and

in view of other incidents (such as the September, 1985 acid leak into Canal Creek) several inspections and visits were conducted by the Environmental Protection Agency, the Maryland environmental agency, CRDEC and APG authorities, and representatives of Congressional offices. Finally, in March, 1986, the Pilot Plant, due to its deterior-ating physical condition, was ordered closed by CRDEC Commander Klugh. In June, 1988, Petitioners were indicted.

II. POINTS AS TO TRIAL

The testimony of Government witnesses certainly established that innumerable meetings and documentation about the Pilot Plant dealt principally with safety issues, rather than environmental concerns. The testimony also demonstrated the complexity of

responsibilities, the APG bureaucracy, and the paperwork required to dispose of even a small amount of the most innocuous chemical. Further, it was shown through Government witnesses that there were varying views within the CRDEC on the continued viability of the Pilot Plant and what should be done about its deteriorating condition.

The Government presented testimony from Pilot Plant employees concerning incidents of removal, transportation, storage, or disposal of chemicals, including transporting chemicals from the Old Pilot Plant to the Pilot Plant, storage of CHRIS chemicals, and problems with the toxic neutralization sumps.

However, at least two Government witnesses confirmed there were limited funds available through utilization of

an "overhead budget" for Pilot Plant repairs and noted budget problems concerning repairs. One witness stated that federal buildings cannot be restored if doing so cost more than half the price of a new structure.

Maj. Gen. James Klugh, CRDEC commander at the time, testified and noted responsibilities regarding the Pilot Plant. Yet he gave little indication that he was aware of Pilot Plant problems or was prepared to assume responsibility for them.

Defense witnesses noted, among other things, a lack of CRDEC emphasis on environmental matters from 1983 to 1985, indicating a lack of urgency about Pilot Plant disposal or storage issues.

Recalling certain Government witnesses, the defense also emphasized

that amid the flurry of memoranda, meetings, documentation, reports, studies, and disposition forms, little if anything was being done to respond to work orders, to emphasize the urgency of Pilot Plant problems, to repair or restore the Pilot Plant to proper working condition, or to inform the Petitioners of specific environmental corrective action required at the Pilot Plant, let alone any potential criminal liability if the situation continued.

Brigadier Gen. Peter Hidalgo stated that installation and CRDEC commanders are responsible for activities within their commands, including environmental problems at the Pilot Plant. He pointed out these duties are non-delegable.

Other defense witnesses noted a dangerous slowness of response through

all authorities within and outside of the CRDEC to the problems at the Pilot Plant. Defense witnesses confirmed Pilot Plant budgetary problems in obtaining CRDEC funds for environmental projects. These witnesses also noted the minimal response by "landlord" APG to its maintenance obligations and the difficulty, even as late as June of 1986 when environmental sensitivity was high due in part to newspaper articles, in obtaining answers from APG to basic environmental concerns.

Witnesses also confirmed that Petitioners repeatedly noted to proper authorities Pilot Plant repair and renovation needs. They also cited the lack of CRDEC command emphasis as to environmental issues at staff meetings.

Petitioners also testified. They

described the interminable problems in seeking repair of the Pilot Plant. They pointed out the high performance appraisals they were receiving during the period that they were supposedly committing criminal acts. They further emphasized the bureaucratic nature of CRDEC which brought inspectors and investigators to the Pilot Plant when newspaper articles and Congressional offices were beginning to raise concerns about environmental and safety issues, but hardly the same interest before.

Petitioners' testimony confirmed that whatever may have been stated in isolated memos or reports, there were no specific recommendations made by CRDEC or APG about hazardous waste management at the Pilot Plant, or about the pressing need to conduct chemical clean-

ups, prior to the Pilot Plant closing in March of 1986. And there was little if any money earmarked or approved for Pilot Plant repair thoughout this time period.

Thus, in these Pilot Plant matters, there was never any criminal intent by Petitioners to violate any environmental laws. Not one of them took any action to deliberately avoid responsibilities.

This situation therefore involves central and crucial issues regarding federal enforcement of environmental laws at federal facilities.

ARGUMENT FOR GRANTING WRIT

I. THE FOURTH CIRCUIT ERRED IN HOLDING THAT PETITIONERS, AS FEDERAL EMPLOYEES, ARE NOT IMMUNE FROM CRIMINAL PROSECUTION FOR VIOLATIONS OF THE RESOURCE CONSERVATION AND RECOVERY ACT

The Fourth Circuit found that the

definition of "person" in the Resource Conservation and Recovery Act at 42 U.S.C. Sec. 6903(15) encompasses Petitioners. The Court stated RCRA's definition of "person" includes "individuals" and Petitioners "of course, were indicted, tried, and convicted as individuals not as agents of the government." Also, "sovereign immunity does not attach to individual government employees so as to immunize them from prosecution for their criminal acts." 912 F.2d at 744.

The Fourth Circuit continued, in affirming the convictions, "Even where certain federal officers enjoy a degree of immunity for a particular sphere of official actions, there is no general immunity from criminal prosecution for actions taken while serving their

office." 912 F.2d at 744.

The Fourth Circuit, however, did not comprehensively consider the immunity question. Central issues are whether immunity from criminal enforcement extends to federal employees acting within official responsibilities, and whether Congress excluded federal employees from criminal prosecution under RCRA.

1. RCRA Language and "Person"

The statute authorizes criminal sanctions for "any person" who knowingly commits an act prohibited by 42 U.S.C. Sec. 6928. And "person," as defined by RCRA (Sec. 6903(15)), is:

> an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body.

The RCRA definition of "person" includes "individuals," but there is no mention of the United States or federal agency.

The term "federal agency" is in fact separately defined in RCRA Sec. 6903(4) as "any department, agency, or other instrumentality of the Federal Government." Thus, the RCRA definition of "person" omits federal agencies or employees. The omission is not semantic.

Congress' deliberate omission of federal agencies from the definition of "person," combined with the plain language of RCRA criminal provisions, leads to the conclusion that Congress decided to prohibit criminal RCRA prosecution of federal agencies. Since the Government can act only through its officers and agents (see, e.g., Arizona

v. Maypenny, 451 U.S. 232, n. 16 (1981)), this exemption applies to agency employees carrying out official responsibilities.

A similar statement as to a federal agency acting through its agents was made in Cooper v. O'Connor, 99 F.2d 135 (D.C. Cir. 1938), involving violations of banking laws by Treasury officials. The court echoed statements in In re Neagle, 135 U.S. 1 (1890); Spalding v. Valis, 161 U.S. 483 (1896); and Clifton v. Cox, 549 F.2d 722 (9th Cir. 1977). Neither is this an academic exercise. It is at the heart of the interests and policies involved in the formation and enactment of RCRA itself.

The exclusion of the United States and federal agencies from RCRA's definition of "person" is thus extremely

pertinent, particularly when the same definition under other federal environmental statutes expressly includes these entities.[1] Where a statute contains a certain provision, as to a given subject, the omission of such provision from a similar statute indicates a different intent existed. Richardson v. Jones, 551 F.2d 918 (3rd Cir. 1977).

Even more revealing is the fact that Congress demonstrated it knew how to include federal agencies in the

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1. Compare 42 U.S.C. Sec. 7602(e) (Clean Air Act) ("person" includes "any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof"), and 42 U.S.C. Sec. 9601(21) (Comprehensive Environmental Response, Compensation, and Liability Act) (definition of person includes "United States Government").

definition of "person" elsewhere in RCRA. In 42 U.S.C. Sec. 6992e(b) (Underground Storage Tanks) it is stated that for purposes of the federal facilities provision of that subchapter, the definition of "person" includes "each department, agency, and instrumentality of the United States."

When Congress includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that Congress acts intentionally and purposefully in doing so. Russello v. United States, 464 U.S. 16 (1983). Thus, the RCRA exclusion of federal agencies and their employees from the definition of "person" plainly shows that Congress did not intend to subject federal employees acting as the agency (that is,

within the scope of their employment) to criminal liability.

Further, that RCRA in its present form does not contain the authority to subject federal facilities or their employees to criminal sanction is underscored by attempts to amend RCRA to permit just such criminal prosecution. (See H.R. 1056 [in Appendix to this Petition], passed by House of Representatives but not by Senate.)

This proposed amendment would explicitly have included federal agencies or employees within the RCRA definition of "person," and allowed for criminal prosecution of federal employees for RCRA violations.

An amendment is intended to change the law as it formerly existed, and is to be given great weight in determining

the intent and meaning of the previous law. See 73 Am.Jur.2d Statutes, Sec. 343, United States v. Canadian Vinyl Industries, Inc., 555 F.2d 806 (Cust.Ct. 1977); May Department Stores Co. v. Smith, 572 F.2d 1275 (8th Cir. 1978), cert.den. 434 U.S. 837, and Johnson v. Heckler, 607 F.Supp. 875 (D.Ill. 1984).

Congress, by this amendment process, thus recognized that RCRA in its present form does not authorize criminal prosecutions against federal employees acting for their agency.

2. Federal Employee Immunity

As to the issue of immunity itself, it is well established that a government official empowered to take action and who acts properly within the scope of

authority, retains this immunity (unless it has been waived). Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 112 n. 22 (1984); Gregoire v. Biddle, 177 F.2d 579, 581 (2nd Cir. 1949), and Swanson v. Willis, 114 F.Supp. 434, 435 (D. Alaska 1953), aff'd 220 F.2d 440 (9th Cir. 1955).

A straightforward reading of RCRA Secs. 6903, 6928, and 6961 further demonstrates RCRA criminal sanctions cannot be applied against federal employees acting within their authority. Civil sanctions alone are permitted.

Federal compliance with RCRA requirements is fully described in Sec. 6961, which provides a sanction of civil injunctive relief. The absence in Sec. 6961 of a reference to criminal sanctions is further indication that

Congress did not intend federal employees to face criminal prosecution. Several courts have found the waiver of sovereign immunity in Sec. 6961 to be extremely limited, or have determined it does not permit criminal prosecution.

In California v. Walters, 751 F.2d 977 (9th Cir. 1984), the court decided California's state criminal sanctions regarding disposal of infectious waste are not a "requirement" under Sec. 6961. Thus RCRA did not compel compliance with state law by the Veterans Administration (as to a Veterans hospital). The Walters court determined the waiver of immunity found in Sec. 6961 extends only to civil injunctive relief.

The court found the language of Hancock v. Train, 426 U.S. 167 (1976), concerning similar provisions of the

Clean Air Act, did not require a more expansive reading of RCRA Sec. 6961. The Walters court stated, "Section 6961 plainly waives immunity to sanctions imposed to enforce injunctive relief, but this only makes more conspicuous its failure to waive immunity to criminal sanctions" (751 F.2d at 978).

This restrictive view of Sec. 6961 as to waiver of immunity, following Walters, is also found in Meyer v. United States Coast Guard, 644 F.Supp. 221 (E.D.N.Car. 1986), involving a civil administrative penalty sought against the Coast Guard by the North Carolina environmental protection agency. The court found that Sec. 6961 "does not waive sovereign immunity for civil penalties" (644 F.Supp. at 223).

As was noted in McClellan Ecological Seepage Situation [MESS] v. Weinberger, 655 F.Supp. 601 (E.D. Cal. 1986), finding also that the sovereign immunity waiver does not extend to civil penalties against federal agencies, the RCRA definition of "person" (Sec. 6903(15)) "seems to name everyone under the sun save for the United States of America." The court also noted:

> This Court cannot believe that if Congress wished to waive immunity for civil penalties it could be so careful, so all-knowing, so engaged in foresight and insight as to define 'person' to include the United States for purposes of jurisdiction in the RCRA citizen suit provision, and yet could forget, misappropriate, or be so negligent as to decline to include the United States in its overall, all-encompassing definition of 'person' in RCRA Sec. 1004(15) [Sec. 6003(15)], which is applicable to compliance orders and civil penalties.

And in United States v. Washington, 872 F.2d 740 (9th Cir. 1989), the court considered state penalties sought against the Hanford Nuclear Reservation operated by the Department of Energy for, among other things, "illegal accumulation of dangerous waste in four non-designated storage areas." The Ninth Circuit again stated that Sec. 6961 does not waive sovereign immunity for state civil penalties. The Washington court stated at 872 F.2d at 743:

> Thus, the only unequivocal and express reference to sovereign immunity in section 6961 is directed at court-ordered sanctions for a violation of an injunction. 'In short, Congress demonstrated that it knows how to select language to waive sovereign immunity to criminal penalties and civil damages, if it so intends.' Parola v. Weinberger, 848 F.2d 956, 962 n. 3 (9th Cir. 1988).

The court stated at 872 F.2d at 746 that

"criminal prosecution is not an enforcement mechanism covered under section 6961."

Further, RCRA legislative history indicates that limiting sanctions against federal facilities to civil injunctive relief was not the result of Congressional inadvertence. (see H.R. Rep. No. 1491, 94th Cong., 2d Sess. at 1976 U.S. Code Cong. and Adm. News, at 6283-84, and 6289, stating that "After considering all aspects of the jurisdictional enforcement problem, the Committee decided to retain sovereign immunity over federal facilities").

Numerous courts therefore have held that 42 U.S.C. Sec. 6961 allows limited waiver of immunity for injunctive relief only, and therefore prohibits prosecutions seeking any other sanction.

This immunity extends to government officials acting within their capacity and in good faith, even if these actions later are determined to be wrongful. In Gravel v. United States, 408 U.S. 606 (1972), involving a senator's private publication of the Pentagon Papers, no immunity was found because the action was outside the legislative process. Conversely, if an act is within official duties and done in good faith, immunity can extend to criminal prosecution (see Braatelein v. United States, 147 F.2d 888, 895 (8th Cir. 1945)).

This immunity applies whether the enforcement action is state or federal. Section 6961 limits all enforcement action against federal agencies to injunctive relief. Congress clearly did not consent to federal officials

criminally prosecuting other federal officers merely doing their jobs.

The Constitution (art. VI, sec. 8, cl. 17), limits legislative authority over federal enclaves to Congress' exclusive jurisdiction. For RCRA purposes, Congress in Sec. 6961 has opted to retain exclusive jurisdiction over APG and similar federal enclaves.

Thus, because Section 6961 and Section 6903 are Congress' expression of RCRA's application to federal enclaves, these sections contain the extent of the United States Attorney's authority to prosecute under RCRA for alleged environmental wrongdoing at federal facilities. Federal enforcement of RCRA requirements at federal facilities is therefore limited to injunctive relief.

The criteria in caselaw drawing the difficult line between sovereign and individual action shows that federal officials do not automatically lose their sovereign immunity protection whenever a violation of a federal statute or regulation occurs. United States v. Yakima Tribal Court, 794 F.2d 1402, 1407 (D.Mont. 1987); Nichols v. Block, 656 F.Supp. 1436, 1440 (D.Mont. 1987). Action by a government official is still the act of the sovereign, even if wrong, provided the official's action was for a purpose vested in him or her. E.g., Larson v. Domestic and Foreign Commerce Corp, 337 U.S. 682, 695 (1949).

As was noted in Scherer v. Morrow, 401 F.2d 204, 205 (7th Cir. 1968), cert.den., 393 U.S. 1084 (1969), "To be within that perimeter, and therefore

absolutely privileged, 'it is only necessary that the action bear some reasonable relation to and connection with the duties and responsibilities of the official.'" (quoting Scherer v. Brennan, 379 F.2d 609, 611 (7th Cir. 1967), cert.den., 389 U.S. 1021 (1967)). Whether a federal employee can be "authorized" to violate RCRA is not the question. Instead, the criteria is whether the actions taken were in the performance of official duties and were necessary to carry out those duties. See Morgan v. California, 742 F.2d 728, 731 (9th Cir. 1984).

Therefore, immunity of federal employees acting with their authority applies to civil and criminal liability. Nothing in RCRA affects this immunity.

Petitioners clearly were charged for acts within official duties, and no more. Their actions were within their responsibilities of conducting and supervising sensitive research, an integral part of the defense establishment. Petitioners did not act solely as "individuals," nor did they act for personal profit or advancement.

The Government's prosecution of the Appellants was not authorized under RCRA and should have been dismissed. This prosecution was therefore invalid.

II. THE FOURTH CIRCUIT ERRED IN FINDING THAT THE REQUISITE CRIMINAL INTENT WAS DEMONSTRATED HERE.

The Fourth Circuit concluded, in affirming the convictions, that Petitioner's argument reduces itself to a contention that "ignorance of the law

is no defense" noting decisions of this Court in United States v. International Minerals, 402 U.S. 558 (1971); United States v. Freed, 401 U.S. 601 (1971); United States Dotterweich, 320 U.S. 277 (1943), and United States v. Balint, 258 U.S. 250 (1922). The Fourth Circuit thus concluded that the Government "did not need to prove defendants knew violation of RCRA was a crime, nor that regulations existed listing and identifying the chemical wastes as RCRA hazardous wastes." 912 F.2d at 745.

The Fourth Circuit did not take into account that the intent requirement for a criminal conviction under RCRA has been variously construed by the Circuits. It also did not consider the intent issue in the rather unique circumstances here.

As to intent, some federal courts have held that criminal liability under RCRA requires a specific intent. Others have indicated a more general intent. Either approach requires a finding of some criminal intent to violate an environmental law.

In United States v. International Minerals, 402 U.S. 558 (1971), this Court considered a conviction for failing to list on shipping papers the nature of certain chemicals being transported, in accordance with federal regulations. The trial court had dismissed the charge (see Boyce Motor Lines v. United States, 342 U.S. 337 (1952)) because the knowledge requirement was not met.

The International Minerals Court noted that Boyce did not apply to the

knowledge issue, because that case dealt only with the vagueness of the statute. This Court indeed stated that ignorance of the law or of the regulation involved is not a defense to criminal liability.

However, this Court also noted, at 402 U.S. at 563-564:

> So far as possession, say, of sulfuric acid is concerned the requirement of 'mens rea' has been made a requirement of the Act [18 U.S.C. Sec. 834] as evidenced by the use of the word 'knowingly.' A person thinking in good faith that he was shipping distilled water when in fact he was shipping some dangerous acid would not be covered.

See also Morissette v. United States, 342 U.S. 246 (1951), noted by International Minerals with approval, and involving criminal charges for removing spent shell casings from an old government bombing range frequented by hunters. The Court in Morissette found

that the requisite criminal intent did not exist and stated that intent as a requirement for a crime is "no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."

However, International Minerals, in reversing the dismissal of the charges, stated that the defendants "must be presumed to be aware" of such regulations, due to the high "probability of regulation" concerning "dangerous or deleterious devices or products or obnoxious waste materials."

Thus, in United States v. Hayes International, 786 F.2d 1499 (11th Cir. 1986), which dealt with criminal RCRA

liability for transporting hazardous waste, judgments of acquittal were reversed. The court rejected a lack of knowledge defense suggested by cases such as Boyce and Liporata v. United States, 417 U.S. 419 (1985) (food stamp authorization cards). Taking a broad view, the court stated it would be "no defense to claim no knowledge that a paint was a hazardous waste within the meaning of the regulations; nor would it be a defense to argue ignorance of the permit requirement."

However, even with Hayes International's approach indicating that a general intent is sufficient, that court recognized the statute does not impose strict liability. There could be situations where a defendant "reasonably believed that [a waste] site had a per-

mit, but in fact had been misled by the people at the site." And the court noted a mistake of fact defense may be possible in certain instances.

See also United States v. Greer, 850 F.2d 1447 (11th Cir. 1988) (criminal RCRA violations as to waste recycling business in Orlando, Florida; court follows Hayes International language as to inference of intent and as to general intent sufficient for criminal violations (850 F.2d at 1452)), and United States v. Protex Industries, Inc., 874 F.2d 740 (10th Cir. 1989) ("knowing endangerment" criminal provisions of RCRA, statute not unconstitutionally vague, instructions as to a general intent were sufficient).

This approach to intent for environmental crimes under RCRA or as to

similar statutes differs from the other oft-cited case of United States v. Johnson & Towers Inc., 741 F.2d 662 (3rd Cir. 1984), cert den. 469 U.S. 1208, involving criminal RCRA transportation and storage violations. On the intent issue, the Johnson & Towers court stated [emphasis supplied]:

> [I]n light of our interpretation of section 6928(d)(2)(A), it is evident that the district court will be required to instruct the jury...that in order to convict each defendant the jury must find that each knew that Johnson & Towers was required to have a permit, and knew that Johnson & Towers did not have a permit. Depending on the evidence...such knowledge may be inferred.

The court noted language in International Minerals that under certain regulatory statutes requiring "knowing" conduct "the government need prove only knowledge of the actions

taken and not of the statute forbidding them." Nevertheless, Johnson & Towers determined that each element of a RCRA criminal offense must be shown to have been "knowingly" committed.

Further, in United States v. Thompson-Hayward Chemical Co., 446 F.2d 583 (8th Cir. 1971), the court reviewed a criminal case similar to International Chemicals as to "knowing" misidentification of chemicals being transported (18 U.S.C. Sec. 834). Jury instructions indicated a "sudden instance of forgetfulness" is no defense and that "neglect, carelessness or inattention" could satisfy the knowledge requirement.

The Thompson-Hayward court reversed, noting willfulness or deliberate action is necessary. The

jury instruction:

> read as a whole, could easily give the jury the impression that no proof of intent or willful neglect was necessary and that it was a situation in which the statute imposed strict liability.

The court noted that strict liability was not intended by the statute and some overt proof of knowledge was necessary. The Government "had to prove beyond a reasonable doubt that defendant's actions were deliberate or the result of willful neglect." [emphasis retained] The instruction did not accomplish this purpose and the conviction was reversed.

In United States v. United States Pipe and Foundry Company, 415 F.Supp. 104 (D. Tenn. 1976), the court stated that knowledge a shipment was of dangerous materials "is essential to a conviction" under the statute, and found

the defendant did not act "willfully and knowingly" in failing to properly mark the vehicle transporting the substances. It thus rendered a not guilty verdict on that count.

In the present case, there was discussion by the Government at trial, particularly in closing argument, of "willful blindness" as tantamount to intent. In United States v. Jewell, 532 F.2d 697 (9th Cir. 1976) cert.den. 96 S.Ct. 3173, the court considered the "willful blindness" issue and stated "willful blindness" is present when a defendant who is "aware of the probable existence of a material fact" does not "satisfy himself that it does not in fact exist."

A "conscious purpose to avoid learning the truth" or "deliberate

ignorance" could be within the "knowing" definition, but such deliberate ignorance must be part of a "calculated effort" to avoid sanctions of a statute while violating its substance.

See also Annotation, 8 ALR Fed 816, "Criminal Liability for Transportation of Explosives and Other Dangerous Articles Under 18 U.S.C. 831-835 and Implementing Regulations" esp. Section 5 (knowledge requirement). And see 21 AmJur2d Criminal Law (Rev.), Secs. 137 and 141. For other discussions of intent issues in environmental statutes, see, e.g., C. Harris, P. Cavanaugh, and R. Zisk, Criminal Liability for Violations of Federal Hazardous Waste Law: The "Knowledge" of Corporations and Their Executives, 23 Wake Forest L.Rev. 203 (1988); A. Fike, A Mens Rea Analysis for

the Criminal Provisions of the Resource Conservation and Recovery Act, 6 Stanford Env.L.J. 174 (1986), and D. Riesel, Criminal Prosecution and Defense of Environmental Wrongs, 15 ELR 10065 (March, 1985).

Thus, knowledge cannot be mere accident or mistake, but must be clearly shown by the evidence. Even "willful blindness" requires "deliberate ignorance" or a "conscious attempt" to avoid the truth.

Yet these descriptions of criminal intent, either the broad view of Hayes International or the more restrictive view in Johnson & Towers, and even the "presumption" that one dealing with hazardous waste must be aware there are regulations concerning that waste (International Minerals), do not, con-

trary to the Fourth Circuit's conclusion, amount to criminal intent here. Petitioners indeed were well aware of the APG regulations dealing with hazardous wastes. But those supposedly comprehensive regulations did not note criminal responsibility for violations. Petitioners were never informed by any superior or base commander in the three years covered by the indictment that such liability could be imposed.

There was ample evidence that Petitioners repeatedly attempted, without success, to arrange for repair and improvements to the Pilot Plant. These repairs were never performed. The Pilot Plant simply was closed.

There was no evidence of any personal gain by Petitioners. This factor significantly speaks to their

lack of criminal intent. Further, chemical storage problems at the Old Pilot Plant problems, began when it was closed in 1978, years before Petitioners came on the scene and four years before the earliest date of the indictment. One cannot "inherit" an environmental crime, another basic issue rejected by the Fourth Circuit without consideration of the background here (see 912 F.2d at 748-49).

Petitioners also did not consciously attempt to evade the truth. They sought to direct attention to and obtain relief from deteriorating Pilot Plant conditions. They did not seek to avoid environmental requirements. Even a general criminal intent to violate environmental law was never shown here.

CONCLUSION

Crucial issues are presented here for review by this Court of immunity and of criminal intent, regarding a major federal environmental law. While this is a unique situation-- federal prosecution against federal employees for alleged violations of environmental laws--it is a scenario likely to be repeated in future federal enforcement of hazardous waste laws at federal facilities. This Court therefore can offer crucial guidance in this area. Petitioners submit these circumstances present a proper case for a Writ of Certiorari, which action they respectfully request.

WILLIAM DEE,
ROBERT LEMTZ,
CARL GEPP

By _____
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(2)

90-877

NO.

IN THE

Supreme Court of the United States

October Term, 1990

No. _____

WILLIAM DEE,
ROBERT LENTZ,
and
CARL GEPP

Petitioners,
v.

UNITED STATES OF AMERICA,

Respondent

Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Fourth Circuit

APPENDIX TO PETITION

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APPENDIX TABLE OF CONTENTS

I. OPINION OF THE FOURTH CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 89-5606

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIAM DEE; ROBERT LENTZ; CARL GEPP,

Defendants-Appellants

Appeal from the United States District Court for the District of Maryland, at Baltimore. John R. Hargrove, District Judge. (CR-88-211-HAR)

Argued: February 8, 1990
Decided: September 4, 1990

Before SPROUSE and CHAPMAN, Circuit Judges, and WARD, Senior United States District Judge for the Middle District of North Carolina, sitting by designation.

Affirmed by published opinion. Judge Sprouse wrote the opinion, in which Judge Chapman and Senior Judge Ward joined.

SPROUSE, Circuit Judge:

William Dee, Robert Lentz, and Carl Gepp (hereafter collectively "defendants") appeal the judgment of the district court entered after a jury trial finding them guilty of multiple violations of the criminal provisions of the Resource Conservation and Recovery Act ("RCRA" or "the Act"), 42 U.S.C. Secs. 6901 et seq.[1]

I.

RCRA provides a comprehensive scheme for regulating storage, transport and disposal of hazardous waste, requiring that it be managed to prevent

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[1] The district court suspended each defendant's sentence and placed each on probation for three years with a condition of 1,000 hours of community service work.

leakage, spillage, hazardous chemical reactions, and migration of toxins into the soil, water, or air. In addition to administrative provisions, the Act creates criminal liability for persons who knowingly handle hazardous waste without a RCRA permit. 42 U.S.C. Sec. 6928(d).[2]

The defendant engineers were civilian employees of the United States Army assigned to the Chemical Research, Development, and Engineering Center at Aberdeen Proving Ground in Maryland. All the defendants were involved in development of chemical warfare systems.

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[2] Paraphrased, the portion pertinent to this case reads: "Any person who knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter without a RCRA permit shall, upon conviction, be subject to fine and/or imprisonment." 42 U.S.C. Sec. 6928(d)(2)(a).

Gepp, a chemical engineer, was responsible for operations at and maintenance of the Pilot Plant;[3] Dee and Lentz were Gepp's superiors. Counts One through Three of the superseding indictment charged the defendants with violating the Act by illegally storing, treating and disposing of hazardous wastes at the Pilot Plant. Count Four focused on violations alleged to have occurred at the "Old Pilot Plant",[4] a separate building complex that was closed in 1978.[5]

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[3] The Pilot Plant complex included a four-story laboratory building, an administrative building, and storage sheds.

[4] The Old Pilot Plant included a laboratory building, an office building, scrubbing towers and a storage area.

[5] A fifth count charged defendants with violation of the Clean Water Act. 33 U.S.C. Secs. 1251 et. seq. The jury could not reach a verdict with respect to this count.

Aberdeen Proving Ground acquired an umbrella RCRA permit for management of hazardous waste materials at the Proving Ground. Under the permit, three separate areas at Aberdeen were designated for storage of hazardous wastes; however, the permit did not allow storage, treatment, or disposal of hazardous wastes at the Pilot Plant or the Old Pilot Plant. Aberdeen in 1982 promulgated a regulation, APG 200-2, that established "policies and procedures for management and disposal of solid and hazardous waste materials at Aberdeen Proving Ground" and mandated compliance with all federal, state, interstate, and local regulations, specifically referencing both the RCRA statute and RCRA regulations.

APG 200-2 directed all tenant organizations, such as the Center, to report any waste material "suspected to be toxic, carcinogenic, caustic, ignitable, or reactive" by filling out a form known as a "hard card." Upon receipt of the hard card, designated Aberdeen organizations were responsible for transporting hazardous wastes to the permitted[6] storage areas. APG 200-2 was specific and thorough, listing various individual chemicals and classes of chemicals that were likely to be hazardous, and reiterating that hazardous wastes were to be managed in accordance with all applicable laws.

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[6] In regulatory parlance and as used in this opinion, "permitted" means an activity for which a valid permit has been issued. Conversely, "unpermitted" means the activity is not authorized by the facility's permit, or that the facility does not have a permit.

In 1982, the Center issued a standard operating procedure, which in 1984 was reissued as a regulation known as CRDCR 710-1. It required identification of all RCRA wastes and directed that they be handled in accordance with the turn-in procedures of APG 200-2. Waste chemicals were defined as "those substances which have deteriorated to the point where they are no longer usable, are contaminated, or cannot be stored safely."

As heads of their respective departments, defendants were responsible for ensuring that the provisions of APG 200-2, CRDCR 710-1, and RCRA were fulfilled within their departments, and that their subordinates were aware of and in compliance with those regulations. Defendants admitted

knowledge of APG 200-2, CRDCR 710-1, and RCRA.

II.

The defendants first contend that they are immune from the criminal provisions of RCRA because of their status as federal employees working at a federal facility. Because 42 U.S.C. SEc. 6928(d) defines those liable as "any person who" knowingly violates the Act, and because neither the United States nor an agency of the United States is defined as a person, defendants maintain they cannot be "persons" in the sense contemplated by Sec. 6928(d). They assert that by reason of their employment by the federal government they are entitled to sovereign immunity, meaning they are immune from this criminal prosecution.

There simply is no merit to this suggestion. The Act defines "person" as

> an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body.

42 U.S.C. Sec. 6903(15). The definition begins with an inclusion of "an individual" as a person. The defendants, of course, were indicted, tried, and convicted as individuals, not as agents of the government. Suffice it to say that sovereign immunity does not attach to individual government employees so as to immunize them from prosecution for their criminal acts. O'Shea v. Littleton, 414 U.S. 488, 503 (1974); cf. Butz v. Economou, 438 U.S. 478, 506 (1978) ("all individuals, whatever their

position in government, are subject to federal law"). Even where certain federal officers enjoy a degree of immunity for a particular sphere of official actions, there is no general immunity from criminal prosecution for actions taken while serving their office. United States v. Hastings, 681 F.2d 706, 710-12 (11th Cir. 1982) ("A judge no less than any other man is subject to the process of the criminal law"), cert.denied, 459 U.S. 1203 (1983); United States v. Diggs, 613 F.2d 988, 1001 (D.C. Cir. 1979) ("Article I, Sec. 5 does not immunize a member of Congress from the operations of the criminal law"), cert. denied, 446 U.S. 982 (1980). See generally United States v. Isaacs, 493 F.2d 1124, 1142-44 (7th Cir.) ("Criminal conduct is not part of

the necessary functions performed by public officials") cert. denied, 417 U.S. 976 (1974).[7]

III

Defendants next contend that they did not "knowingly" commit the crimes proscribed by RCRA. See 42 U.S.C. Sec. 6928(d). They claim that there was insufficient evidence to show that they knew violation of RCRA was a crime; also, that they were unaware that the chemicals they managed were hazardous wastes.

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[7] Because defendants were prosecuted as individuals, their argument as to the scope of Congresses' waiver of immunity under 42 U.S.C. Sec. 6961 is inapposite. The same may be said of their reliance on California v. Walters, 751 F.2d 977 (9th Cir. 1984), which involved an attempt by the City of Los Angeles to prosecute a federal agency and its administrator under

The Supreme Court has repeatedly rejected similar arguments in cases involving recognition of dangerous materials, applying the familiar principle that "ignorance of the law is no defense." United States v. International Minerals & Chem. Corp., 402 U.S. 558, 563 (1971); United States v. Freed, 401 U.S. 601, 607-610 (1971); United States Dotterweich, 320 U.S. 277, 280-81 (1943), and United States v. Balint, 258 U.S. 250 (1922). We agree with the Eleventh Circuit that this time-honored rule applies to

[continuation of footnote 7]

California hazardous waste law. The Ninth Circuit held that, although 42 U.S.C. Sec. 6961 directs federal agencies to comply with state hazardous waste laws, Congress did not intend to waive the United States' sovereign immunity to criminal sanctions.

Walters does not apply here for two reasons. First, unlike the case sub

prosecutions under RCRA. United States v. Hayes Int'l Corp., 786 F.2d 1499, 1502-03 (11th Cir. 1986); see also United States v. Hoflin, 880 F.2d 1033, 1036-39 (9th Cir. 1989), cert. denied, 110 S.Ct. 1143 (1990); cf. United States v. Johnson & Towers, Inc., 741 F.2d 662, 669 (1984), cert. denied, 469 U.S. 1208 (1985). "[W]here, as here. . ., dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of

[continuation of footnote 7]
judice, Walters involved an action against a federal agency and its administrator in his official capacity. The Walters court expressly warned: "Our decision is compelled by the parties' agreement that the action is essentially one against the United Stats. Our holding in this case does not necessarily apply in all cases to prosecutions against federal officers or federal agencies." Id. at 979.

them or dealing with them must be presumed to be aware of the regulation." International Minerals, 402 U.S. at 565.

Therefore, the government did not need to prove defendants knew violation of RCRA was a crime, nor that regulations existed listing and identifying the chemical wastes as RCRA hazardous wastes. However, we agree with defendants that the knowledge element of Sec. 6928(d) does extend to knowledge of the general hazardous character of the wastes. Among its jury instructions, the district court included one that

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[continuation of footnote 7]

Second, Walters involved an attempt by a state to enforce state law against a federal agency and its officer. In certain circumstances, federal officers may avoid criminal prosecution by a state when the alleged crime arose from performance of federal duties. Cunningham v. Neagle, 135 U.S. 1, 75-76 (1890); Morgan v. California, 742 F.2d 728, 731 (9th Cir. 1984). The supremacy

advised:

> The government must prove beyond a reasonable doubt that each defendant knew that the substances involved were chemicals. However, the government need not establish that the defendants knew that these chemicals were listed or identified by law as hazardous waste...

While these statements are correct, it was error to instruct the jury that defendants had to know the substances involved were chemicals, without indicating that they also had to know the chemicals were hazardous. See Hoflin, 880 F.2d at 1039; Johnson & Towers, 741 F.2d at 668; compare United States v. Greer, 850 F.2d 1447, 1450

[continuation of footnote 7]

clause concerns which give rise to Neagle-type immunity are not implicated in this case, which involves prosecution for federal crimes by the federal government.

(11th Cir. 1988) (jury instructed that defendant had to know the chemical waste had potential to harm others or the environment). However, we think the error was harmless. The record reflects overwhelming evidence that defendants were aware they were dealing with hazardous chemicals. See Pope v. Illinois, 481 U.S. 497, 501-03 (1987); Rose v. Clark, 478 U.S. 570, 576-79 (1986) (conviction should stand if the reviewing court can confidently say that no rational juror, if properly instructed, could have found for defendant).[8] Contrary to defendants'

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[8] We find no merit to the other contentions raised by the defendants in connection with the district court's instruction. As a whole, the instructions "fairly and adequately state[d] the pertinent legal principles involved." See Hogg's Oyster Co. v. United States, 676 F.2d 1015, 1019 (4th Cir. 1982).

assertions, the evidence also clearly established that the materials they handled were "wastes" as that term is used in the statute.[9]

IV

In addition to the preceding general challenges to their convictions, defendants raise issues specific to each count.

Count One charged defendants with unpermitted storage and disposal of a hazardous waste--dimethyl polysulfide--at the Pilot Plant from June 1983 to

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[9] Defendants' self-serving argument that materials were not wastes until they declared them wastes is without merit. Furthermore, the evidence demonstrates that defendants considered some if not all of the chemicals listed under each count to be wastes because they ordered their disposal.

August 1984. Gepp and Lentz were found guilty of this count.

Dimethyl polysulfide is a chemical the Center had considered as a component for a binary chemical weapon.[10] During the 1970s, the Center produced dimethyl polysulfide at the Pilot Plant and also purchased some from chemical companies. In 1980, 200 canisters of dimethyl polysulfide were brought to the Pilot Plant from Fort Sill, Oklahoma, because they were leaking. All the dimethyl polysulfide was stored on the fourth floor of the Pilot Plant. Included were batches that

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[10] Binary weapons make use of two chemicals, neither of which is lethal by itself, but which combine to form a lethal agent.

had tested to be "bad" or "off-spec."

By 1981, the chemical weapon program which would have used the dimethyl polysulfide was cancelled. No more dimethyl polysulfide was produced, and no projects which would use dimethyl polysulfide were planned. In May 1983, a safety inspector warned Lentz and Gepp that the roof of the Pilot Plant might collapse and that they should move the dimethyl polysulfide, but no action was taken. Four months later, a corner of the Pilot Plant did collapse, crushing several drums so that dimethyl polysulfide spilled and drained into the floor drains.

For the next several months, employees complained frequently to Lentz and Gepp about noxious odors from the dimethyl polysulfide, but not until

spring of 1984 did Gepp direct employees to move the containers of dimethyl polysulfide outside and to fill out hard cards on them. Gepp did not turn in the hard cards to the proper Aberdeen office until August 1984.

Defendants contend that dimethyl polysulfide is not a hazardous waste. It is not a listed hazardous waste,[11] but the government's theory at trial was that the dimethyl polysulfide handled by defendants came within the definition of a "characteristic" hazardous waste, because its "flash point" was less than 140° F.[12] Defendants argue that there was insufficient evidence to prove that

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11 See 40 C.F.R. Part 261, Subpart D.

12 See 40 C.F.R. Sec. 261.21.

dimethyl polysulfide had a flash point of less than 140° F, because a defense witness testified that he had conducted tests on dimethyl polysulfide which indicated flash points of 154° to 163° F. Cross-examination of the witness, however, reflected irregularities in his testing procedures. Additionally, the government introduced the following evidence: a Material Safety Data Sheet supplied by a manufacturer of dimethyl polysulfide indicating a flash point of 104° F; testimony by the person who had transported the dimethyl polysulfide from Fort sill that he had seen a Material Safety Data Sheet listing the flash point as 124° F; and the "hard card" which Gepp filled out on the dimethyl polysulfide listing the flash point as being between 61° and 100° F.

In our view this evidence easily supports the jury verdict which implicitly found that dimethyl polysulfide was a characteristic hazardous waste. Cf. Greer, 850 F.2d at 1452 (evidence sufficient to support jury's conclusion that waste material was 1,1,1 trichloromethane).

Defendants also contend the dimethyl polysulfide was not a "waste" because it was still usable, i.e., that it was not prudent to discard it because it conceivably could be of value to the weapons program at some time in the future. This argument is controverted by the fact that the defendants disposed of the dimethyl polysulfide in 1984.[13]

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[13] It is perhaps worth noting that RCRA does not require disposal of hazardous wastes. Prudent retention of a waste in the hope that it will someday

Count Two charged defendants with unpermitted storage and disposal of hazardous wastes at the Pilot Plant compound from June 1983 to April 1986. Only Gepp was convicted of the violations alleged in this count.

The United States Coast Guard had developed a program called the Chemical Hazard Response Information System (CHRIS) project. As part of the project, the Coast Guard contracted with the Center to study various hazardous chemicals in order to develop a manual for effectively responding to spills of those chemicals. At Gepp's direction,

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[continuation of footnote 13]

be a treasure is permissible if it is stored in accordance with a RCRA permit. See 40 C.F.R. Sec. 261.2(e)(2)(iii).

many excess and leftover CHRIS chemicals were placed in a shed in the Pilot Plant complex. Others were stored at various locations about the Pilot Plant.

On a number of occasions from 1980 to 1986, Gepp was informed by employees and safety inspectors that there were problems with the stored CHRIS chemicals, including corrosion and breakage of containers, leaks and spills, generation of fumes, and proximity of incompatible chemicals. Gepp either made no response to these warnings or merely told staff to clean it up as best they could. Finally, in 1986, the commander of the Center ordered operations at the Pilot Plant halted and the complex cleaned up. Hundreds of different chemicals were removed and taken to the Aberdeen

hazardous waste storage facility. Other chemicals had to be destroyed by detonation because they were too unstable to be transported.

Gepp concedes that the chemicals were hazardous and that there was no used for them, but he asserts there was "little evidence" that he directed the storage and disposal operations. The government's evidence, however, shows that Gepp was in charge of operations at the Pilot Plant and that Gepp originally ordered the placement of leftover CHRIS chemicals in the storage shed. Gepp repeatedly ignored warnings about the hazardous condition of the CHRIS chemicals and other chemicals that were improperly stored about the Pilot Plant. He undertook no actions to comply with RCRA

in the storage and disposal of the chemicals prior to the 1986 cleanup.

Defendants assert there was insufficient evidence that management of the CHRIS chemicals was an environmental crime, because "'Sloppy' storage procedures is [sic] not a crime." They are simply wrong. Negligent and inept storage of hazardous wastes is one of the evils RCRA was designed to prevent, and Sec. 6928(d) makes such egregious conduct a crime.

Count Three charged defendants with unpermitted treatment and disposal of hazardous wastes at the Pilot Plant from June 1983 to March 1986.[14] Lentz

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[14] Count Two involved storage and disposal of leftover CHRIS chemicals at the Pilot Plant. Count Three involved separate treatment and disposal of other chemicals at the Pilot Plant.

and Gepp were found guilty on this count.

Several sumps which collected materials from laboratories were located in the Pilot Plant. Periodically, the contents of the sumps were pumped to "neutralization tanks."[15] Between June 1983 and March 1986, numerous hazardous waste chemicals were dumped into the sumps at Gepp's direction. Additionally, at the direction of Gepp and Lentz, drums containing hazardous waste chemicals were cleaned by dumping the chemical onto the ground at the Pilot Plant, then rinsing the drum with acetone, alcohol or water, and dumping

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[15] The tanks were able to neutralize simple acids and bases, but did not provide treatment for other types of hazardous waste.

the rinsate onto the ground. Also, a Pilot plant incinerator which was not permitted for incineration of hazardous waste was used to dispose of methyl chloride, which is a listed hazardous waste.

Lentz and Gepp contend that any disposal of hazardous wastes into the Pilot Plant sumps was exempt from the requirements of RCRA. The definition of solid waste excludes mixtures of domestic sewage and other wastes which go to a "publicly-owned treatment works." 40 C.F.R. Sec. 261.4(a). The Pilot Plant sumps fed into neutralization tanks that were connected to a sewer system that fed into a sewage treatment plant. Defendants therefore claim disposal into the Pilot Plant

sumps was exempt from regulation under RCRA.

Defendants have not pointed to evidence in the record establishing the factors of a Sec. 261.4(a) exclusion.[16] However, we need not decide the issue, because defendants do not dispute that the government proved other unpermitted treatment and disposal of hazardous wastes at the Pilot plant--dumping of wastes on the ground and incineration of methyl chloride.[17]

Count Four charged defendants with unpermitted storage and disposal of

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[16] To come within this exclusion, the wastes from the Pilot Plant would have to mix with sanitary wastes from residences prior to entering the sewage treatment facility. See Comite Pro Rescate De La Salud v. Puerto Rico Aqueduct & Sewer Auth., 888 F.2d 180, 184-86 (1st Cir. 1989) (domestic sewage exclusion requires that the sanitary waste come from residences as opposed to

hazardous wastes at the Old Pilot Plant from June 1983 to August 1986. Lentz and Dee were found guilty on this count.

The Old Pilot Plant had been used for bench-scale laboratory experiments. Operations there ceased in 1978, with chemicals left in storage in various buildings. Beginning in 1981, when they became responsible for the Old Pilot plant, Lentz and Dee were warned on several occasions by safety inspectors that improper storage of chemicals at the Old Pilot Plant was creating a hazard and that chemicals

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[continuation of footnote 16]
bathrooms used by workers); cert. denied, 100 S. Ct. 1476 (1990). Furthermore, the sewage plant would have to be a "publicly owned treatment works," as that term is defined by RCRA. See 40 C.F.R. Sec. 260.10.

17 We also need not reach appellants' argument that RCRA chemicals were not detected at "hazardous levels"

should be removed in accordance with APG 200-2. Although Lentz had an employee draft a cleanup plan for the Old Pilot Plant in 1983, hazardous waste chemicals remained in storage there until 1986. Dee and Lentz admitted at trial that they were aware of storage problems at the Old Pilot Plant; Dee stated he did not consider cleanup of the building a priority.

Lentz and Dee contest their convictions under Count Four claiming that they could not "inherit an environmental crime." This argument borders on the frivolous. The indictment charged defendants with unpermitted

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[continuation of footnote 17]

in the sumps. We note, however, that RCRA flatly prohibits unpermitted disposal of hazardous wastes. The concentration of the wastes after disposal has no bearing on whether the disposal was illegal.

storage of hazardous wastes at the Old Pilot plant from June 1983 to August 1986. There is substantial evidence in the record that during this time period defendants were responsible for maintenance of the Old Pilot Plant, that they were aware of the hazardous condition of chemical storage there, and that they failed to ensure that the hazardous wastes were managed in accordance with RCRA. Defendants may have inherited an environmental problem, but their criminal culpability arises solely from their own ongoing failure to comply with RCRA during the period they were responsible for the Old Pilot Plant.

IX

In view of the above, the judgment of the district court is

 AFFIRMED.

II. STATUTES OR REGULATIONS INVOLVED

(pertinent parts only, emphases retained)

42 U.S.C. Sec. 6903. Definitions.

* * *

(4) The term "Federal agency" means any department, agency, or other instrumentality of the Federal Government, any independent agency or establishment of the Federal Government including any Government corporation, and the Government Printing Office.

* * *

(15) The term "person" means an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body.

42 U.S.C. Sec. 6928. Penalties.

(d) Criminal penalties.

[It shall be a criminal violation when any person]...

(2) knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subtitle. * * *

(A) without a permit under this subtitle or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act [33 U.S.C. Secs. 1411 et seq.]

* * *

shall, upon conviction, be subject to a fine of not more than $50,000 for each day of violation, or imprisonment not to exceed two years (five years in the case of a violation of paragraph (1) or (2)), or both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment under the respective paragraph shall be doubled with respect to both fine and imprisonment.

42 U.S.C. Sec. 6961. Application of Federal, State, and local law to Federal facilities.

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions or injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges. Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief.

* * * [One-year renewable exemptions from requirements if in the paramount interest of United States, requirement of annual report to Congress on exemptions].

III. PROPOSED RCRA AMENDMENT

H.R. 1056
[pertinent part only]

101st Congress
1st Session

IN THE SENATE OF THE UNITED STATES

July 20 (legislative day, January 3), 1989

Received; read twice and referred to the Committee on Environment and Public Works

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AN ACT

To amend the Solid Waste Disposal Act to clarify provisions concerning the application of certain requirements and sanctions to Federal facilities.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Section 1. Short Title.

This Act may be cited as the "Federal Facilities Compliance Act of 1989".

Sec.2. Application of Certain Provisions to Federal Facilities.

(a) IN GENERAL.--Section 6001 of the Solid Waste Disposal Act (42 U.S.C. 6961) is amended--

(1) by inserting "(a) IN GENERAL.--" after "6001.";

(2) in the first sentence, by inserting "and management" before "in the same manner";

(3) by inserting after the first sentence the following: "The Federal, State,

interstate, and local substantive and procedural requirements referred to in this subsection include, but are not limited to, all administrative orders and all civil and administrative penalties and fines."; and

(4) by inserting after the second sentence the following: "For purposes of enforcing any such substantive or procedural requirement (including, but not limited to, any injunctive relief, administrative order, or civil or administrative penalty or fine) against any such department, agency, or instrumentality, the United

States hereby expressly waives any immunity otherwise applicable to the United States. No agent, employee, or officer of the United States shall be personally liable for any civil penalty under any Federal or State solid or hazardous waste law with respect to any act or omission within the scope of his official duties. An agent, employee, or officer of the United States shall be subject to any criminal sanction (including, but not limited to, any fine or imprisonment) under any Federal or State solid or hazardous waste law, but no

department, agency, or instrumentality of the executive, legislative, or judicial branch of the Federal Government shall be subject to any such sanction.".

* * *

SEC. 3. DEFINITION.

(a) PERSON.--Subtitle F of the Solid Waste Disposal Act is amended by adding at the end the following:

"SEC. 6005. DEFINITION OF PERSON.

"For purposes of this Act, the term 'person' wherever used in this Act, shall be treated as including each department, agency, and instrumentality of the United States."

(b) TABLE OF CONTENTS.--The table

of contents for

such subtitle F is amended by adding the following new item at the end:

"Sec. 6005. Definition of person.".

* * *

(3)

No. 90-877

In the Supreme Court of the United States

OCTOBER TERM, 1990

WILLIAM DEE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners are immune from prosecution for treatment, storage and disposal of hazardous waste in violation of the Resource Conservation and Recovery Act, 42 U.S.C. 6928(d)(2)(A), on the ground that the offenses occurred in the course of their work as federal employees.

2. Whether the district court was required to instruct the jury that petitioners could be found guilty only if they knew that treating, storing or disposing of hazardous waste without a permit could give rise to criminal liability.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. i-xxxii) is reported at 912 F.2d 741.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 1990. The petition for a writ of certiorari was filed on December 3, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners, who held civilian positions in the United States Army's chemical weapons program, were convicted of knowingly treating, storing and disposing of hazardous wastes without a permit, in

violation of Section 3008(d)(2)(A) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6928(d)(2)(A). The district court suspended imposition of sentence, placed petitioners on three years' probation, and ordered each to perform 1,000 hours of community service. The court of appeals affirmed.

1. Congress enacted RCRA to combat widespread problems associated with improper disposal of hazardous wastes. Congress recognized that if not disposed of properly, "hazardous wastes present a clear danger to the health and safety of the population and to the quality of the environment." H.R. Rep. No. 1491, 94th Cong., 2d Sess. 3 (1976). Under RCRA, no hazardous waste may be treated, stored, or disposed of except at a facility where those activities are authorized by permit. 42 U.S.C. 6925(a).

Petitioners worked in the Chemical Research, Development and Engineering Center (CRDEC), an organization engaged in military research at the Army's Aberdeen Proving Ground (APG) in Maryland. C.A. Supp. App. 14. Petitioner Dee headed a branch of CRDEC known as the Munitions Directorate. Petitioner Lentz, who reported to Dee, headed a division within the Directorate that was responsible for developing production facilities for certain chemical weapons. Petitioner Gepp, who reported to Lentz, managed the Pilot Plant, a research facility that included a four-story laboratory, an administration building, and a number of storage sheds. *Id.* at 309, 521-524. A separate complex, known as the Old Pilot Plant, was used by CRDEC for research operations until 1978 and for storage after that date. *Id.* at 458. All three petitioners are chemical engineers by training. Tr. 3586-3589, 3762, 3951; Pet. App. iii-iv.

APG obtained all environmental permits for activities conducted by its tenant organizations, including CRDEC. RCRA permits issued to APG in 1981 and 1985 identified sites where designated hazardous wastes could be stored and incinerated. Neither the Pilot Plant nor the Old Pilot Plant was among those sites. Each tenant organization at APG, including CRDEC, was responsible for proper management of its own wastes in accordance with the APG's permit and all other applicable restrictions. C.A. App. 228-229; C.A. Supp. App. 15-17; Pet. App. v.

In 1982, the Army issued APG Regulation 200-2 (APG 200-2), which set forth procedures for all APG tenant organizations to follow in treating, storing, and disposing of solid and hazardous wastes. See C.A. App. 1227-1245. It required compliance with all federal, state, and local laws and regulations and contained specific references to RCRA and implementing regulations. *Id.* at 1228. In 1984, CRDEC issued CRDC 710-1, a regulation setting forth mandatory CRDEC procedures for management of laboratory chemicals and chemical wastes. C.A. App. 1268-1272. This regulation required CRDEC personnel to maintain accurate inventories of chemicals regulated under RCRA and to follow the disposal procedures specified in APG 200-2 for chemical wastes. "As heads of their respective departments, [petitioners] were responsible for ensuring that the provisions of APG 200-2, [CRDC] 710-1, and RCRA were fulfilled within their departments, and that their subordinates were aware of and in compliance with those regulations." Pet. App. vii.

2. Petitioners were indicted on four counts of violating Section 3008(d)(2)(A) of RCRA. C.A. App.

1-11, 111-120. The jury returned a total of seven convictions on those counts.[1]

a. Petitioners Lentz and Gepp were convicted under Count One of illegally storing and disposing of dimethyl polysulfide. This chemical, classified as a hazardous waste by virtue of its low ignition temperature, had been produced at the Pilot Plant and purchased from outside vendors for a weapons program that was cancelled in 1981. Thereafter, the fourth floor of the main Pilot Plant building was used to store drums of dimethyl polysulfide that were left over from the project, along with 200 canisters shipped from another installation after developing leaks. In May 1983, a safety inspector warned Lentz and Gepp that the Pilot Plant's roof might collapse and that they should move the dimethyl polysulfide, but no action was taken. In September 1983, part of the roof did collapse, crushing several drums and spilling their contents into floor drains. Employees repeatedly complained to Lentz and Gepp about the odor of the spilled chemical, but they took no action until the spring of 1984, when Gepp directed employees to move the drums outside and complete the paperwork for disposal. Pet. App. xvii-xx.

b. Gepp was also convicted under Count Two of storing and disposing of hazardous wastes at the Pilot Plant without a permit. This charge was based on the handling of a wide range of wastes, including numerous samples left over from a project to develop a Coast Guard manual for responses to spills of hazardous chemicals. In 1978, at Gepp's instruction, con-

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[1] A fifth count charged petitioners with violating the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.* The jury could not reach a verdict on that count. Pet. App. iv n.5.

tainers of samples were moved into an outbuilding. C.A. App. 319-320. Gepp disregarded or responded inadequately to repeated warnings that leaks from the containers were creating a hazard. Outdated and excess chemicals were also stored at other locations in the Pilot Plant complex, and APG safety inspectors issued repeated notices of violation concerning improper chemical storage there. *Id.* at 433-444, 449-452; C.A. Supp. App. 66-69. In 1986, the CRDEC Commander ordered a halt to operations at the Pilot Plant and a complete cleanup. Cleanup personnel found unlabelled and improperly stored chemical containers throughout the Pilot Plant. Fumes from leaking chemicals in the outbuilding forced cleanup personnel to wear breathing equipment for this part of the job. C.A. App. 722-726. A number of chemicals were considered too unstable to be transported and were taken to an open field and destroyed by detonation. C.A. Supp. App. 34-37, 403-405. Hundreds of other chemicals were taken from the Pilot Plant to the APG hazardous waste storage facility. Pet. xxiii-xxv.

c. Lentz and Gepp were convicted under Count Three of knowingly treating and disposing of hazardous wastes at the Pilot Plant without a permit, based on three types of activities. First, the incinerator was used to burn a hazardous waste, methyl chloride. C.A. Supp. App. 32-33, 363. Second, at Gepp's direction, sumps on the Pilot Plant's first floor were repeatedly used as repositories for large quantities of waste chemicals, including a number of hazardous substances, C.A. App. 508-510, 527-531, 648-650; the sumps were periodically emptied into outside tanks, which were part of a "neutralization" system that was capable, at most, of adjusting the

acidity or alkalinity of liquid wastes. Pet. App. xxvii & n.15. Finally, Gepp and Lentz directed employees to clean drums used to store hazardous chemicals by dumping the remaining contents and rinsing agents on the ground outside the Pilot Plant. *Id.* at xxvi-xviii.

d. Petitioners Dee and Lentz were convicted under Count Four of knowingly storing or disposing of hazardous wastes at the Old Pilot Plant between June 1983 and August 1986. That facility had been used for small-scale laboratory experiments until it was closed in April 1978. From 1981 through 1983, the CRDEC Safety Office issued repeated warnings that improper storage of waste chemicals at the Old Pilot Plant posed a severe safety hazard. In 1983, Lentz directed a CRDEC employee to develop a cleanup plan for that facility, in accordance with APG regulations. Although many chemical wastes were taken to the Pilot Plant under the plan, others remained at the site until 1986. At trial, Dee and Lentz admitted that they were aware of the storage problems at the Old Pilot Plant, although they disagreed with the Safety Office's assessment that the wastes presented a hazard. Tr. 3687-3691, 4007-4008, 4015, 4021-4023. Manifests completed for disposal of the wastes indicated that many were covered by RCRA. C.A. App. 565-566; see Pet. App. xxix-xxxii.

3. A unanimous panel of the court of appeals affirmed petitioners' convictions. Pet. App. i-xxxii. The court rejected petitioners' claim that they were immune from prosecution for offenses committed in the course of their employment by the federal government. *Id.* at viii-xi. It reasoned that petitioners are "persons" subject to prosecution under Section 3008(d) of RCRA, 42 U.S.C. 6928(d), because they

were charged in their individual capacities and Section 1004(15) of RCRA, 42 U.S.C. 6903(15), expressly includes individuals in the definition of "persons." Pet. App. viii-ix. The court also rejected petitioners' argument that they did not "knowingly" commit the crimes because there was insufficient evidence that they knew violation of RCRA was a crime. *Id.* at xi-xvii. That contention, the court held, conflicts with "the familiar principle that 'ignorance of the law is no defense.'" *Id.* at xii (quoting *United States* v. *International Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)).[2]

ARGUMENT

The court of appeals correctly rejected petitioners' challenges to their convictions. Federal employees are not insulated from prosecution for criminal violations of RCRA. In addition, consistent with the principle that ignorance of the law is no excuse, Section 3008 (d)(2)(A) of RCRA does not require proof that the defendant knew that his conduct was a crime. Neither of these holdings below conflicts with any decision of this Court or another court of appeals. Accordingly, further review is not warranted.

1. Petitioners argue (Pet. 28-47) that they are immune from prosecution for violations of Section 3008

[2] The court of appeals held that Section 3008(d)(2)(A) does require knowledge that the wastes in question are hazardous and agreed with petitioners that the jury instructions on this issue were inadequate, but it found the error harmless in light of the "overwhelming evidence that defendants were aware they were dealing with hazardous chemicals." Pet. App. xiv-xvi. Petitioners do not renew their challenge to those instructions here. The court of appeals also rejected several other arguments that petitioners likewise do not renew. *Id.* at xvi n.8, xvii-xxxii.

(d)(2)(A) of RCRA committed in the course of their work. The text of RCRA, however, makes clear that petitioners are subject to criminal prosecution, and no judicially fashioned principles of immunity remove them from RCRA's coverage.

a. Section 3008(d)(2)(A) of RCRA provides that "[a]ny person" who knowingly treats, stores or disposes of any hazardous waste without a permit issued under RCRA shall be subject to criminal penalties. 42 U.S.C. 6928(d)(2)(A). Section 1004(15) of RCRA defines the term "person" to mean "an *individual*, trust, firm, joint stock company, corporation * * *, partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. 6903(15) (emphasis added). Petitioners are "individuals," and they therefore are "persons" subject to criminal prosecution under Section 3008(d)(2)(A). Nothing in these all-encompassing provisions suggests that individuals who happen to be employed by the United States are exempt from criminal liability. To the contrary, Section 3008(d) states that "[*a*]*ny* person"—and therefore *any* "individual"—who commits a proscribed act is subject to criminal liabiilty. Compare *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United Distribution Cos.*, No. 89-1452 (Jan. 8, 1991), slip op. 10 (giving all-encompassing effect to term "any"); *United States* v. *Monsanto*, 109 S. Ct. 2657, 2662 (1989).

Petitioners contend (Pet. 30-35) that because the definition of "person" in Section 1004(15) does not include a federal agency—and because a federal agency therefore is not subject to criminal prosecution under Section 3008(d)—employees of a federal agency must also be exempt from prosecution. As the court of appeals observed, however, petitioners "were

indicted, tried, and convicted as individuals, not as agents of the government." Pet. App. at ix. As individuals, they clearly are subject to criminal liability under Section 3008(d). The liability of an individual employee is independent of any liability to which his employer may be subject. Cf. *United States* v. *Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 745 (8th Cir. 1986) (corporate employees are "individuals"), cert. denied, 484 U.S. 848 (1987). Moreover, the fact that Congress omitted federal agencies from the definition of the term "person" in Section 1004(15), while including all "individual[s]" without any parallel exclusion of federal employees, reinforces the conclusion that federal employees do not fall outside the category of "persons" who are subject to criminal liability.[3]

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[3] Petitioners seek (Pet. 35-36) support for their view of the criminal liability of federal employees in proposed amendments to RCRA that were approved by the House of Representatives, but not the Senate, during the last Congress. See H.R. 1056, 101st Cong., 1st Sess. (1989). Section 2 of that bill would have amended Section 6001 to provide that "[a]n agent, employee, or officer of the United States shall be subject to any criminal sanction * * * under any Federal or State solid or hazardous waste law," Pet. App. xxxix-xl, and Section 3 would have added a new Section 6005 to RCRA to define the term "person" to include a federal agency. Pet. App. xl.

Petitioners speculate (Pet. 36) that the authors of this proposal must have shared their view "that RCRA in its present form does not authorize criminal prosecutions against federal employees." The views of Members of a subsequent Congress are not a reliable source of guidance in interpreting an Act of Congress. See, *e.g.*, *Sullivan* v. *Finkelstein*, 110 S. Ct. 2658, 2665 n.8 (1990); *United States* v. *Mine Workers*, 330 U.S. 258, 281-282 (1947). In any event, petitioners' speculation in this case about the views of the House of Representatives in the last Congress is incorrect, because the back-

b. Petitioners rely (Pet. 36-47) on principles of immunity that protect federal employees in quite distinct settings, such as criminal or civil actions under *state* law. Those judicially fashioned principles do not override the terms of a federal statute that subjects federal employees to criminal liability.

As an initial matter, petitioners' reliance (Pet. 37-43) on the doctrine of *sovereign* immunity is misplaced. We agree with petitioners that, absent congressional consent, sovereign immunity protects the United States and its agencies from suit and civil penalties—and, of course, from criminal penalties. And sovereign immunity also bars a suit against a federal officer or employee in his official capacity, where relief would run against the government itself. See, *e.g.*, *Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89, 112-116 (1984); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 695 (1949); cf. *Brandon* v. *Holt*, 469 U.S. 464, 472-473 (1985). But sovereign immunity does not bar a civil suit or criminal prosecution against a federal employee in his *individual* capacity, where the relief or

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ground of H.R. 1056 makes clear that it was not intended to change existing law with respect to the criminal liability of federal employees. The House Report, for example, stated: "Individual employees shall *continue* to be held responsible for criminal acts, but no federal department, agency, or instrumentality shall be subject to criminal sanctions." H.R. Rep. No. 141, 101st Cong., 1st Sess. 46 (1989) (emphasis added). See also *id.* at 47 n.1 (Justice Department letter stating that bill's provision expressly subjecting federal employees to criminal liability is unnecessary because they already are covered by RCRA's definition of "person"); 135 Cong. Rec. H3894 (daily ed. July 19, 1989) (remarks of Rep. Luken) (H.R. 1056 "retains the current law which allows prosecution of Federal employees for criminal violations").

sanction would not run against the government itself.

For the foregoing reasons, petitioners' claim of exemption from criminal prosecution is based on principles of *official*, not sovereign, immunity. Where it applies, official immunity does protect federal and state officers from actions brought against them in their individual capacities. Contrary to petitioners' assertion, however, there is no presumption that federal employees enjoy official immunity from prosecution for federal crimes committed within the scope of their federal employment.

In *Gravel* v. *United States*, 408 U.S. 606 (1972), a United States Senator sought to quash a subpoena directing his assistant to appear before a grand jury investigating the publication of the Pentagon Papers. The Senator argued that questioning of his assistant should be strictly limited by the Speech or Debate Clause (U.S. Const. Art. I, § 6) and a common-law privilege protecting the legislative process. The Court held that questioning of the Senator's aide was forbidden under the Clause only insofar as it concerned legislative acts, such as preparation for and conduct at a subcommittee meeting. The Court reasoned that the purpose of the Clause—to free legislators "from executive and judicial oversight that realistically threatens" their independence—does not require immunity from criminal prosecution for all acts that Senators perform "in their official capacity as Senators." 408 U.S. at 618, 624-625. Significantly, the Court also rejected the argument for a nonconstitutional, judicially created immunity, stating that it would not "carry a judicially fashioned privilege so far as to immunize criminal conduct proscribed by an Act of Congress." *Id.* at 627; see also

United States v. *Brewster*, 408 U.S. 501, 507-529 (1972) (Speech or Debate Clause does not immunize Senator from prosecution for accepting a bribe to influence his official actions).

A similar reluctance to insulate public officials from accountability under the criminal law is also evident in *O'Shea* v. *Littleton*, 414 U.S. 488 (1974). There, the Court observed that although a state judge would enjoy absolute immunity from civil liability in a civil-rights action arising out of his judicial duties, the absence of immunity from criminal prosecution would furnish an important check against misuse of office. The Court explained that it had "never held that the performance of the duties of judicial, legislative or executive officers requires or contemplates the immunization of otherwise criminal deprivations of constitutional rights." 414 U.S. at 503. Two years later, in *Imbler* v. *Pachtman*, 424 U.S. 409 (1976), the Court observed that although state prosecutors are protected by absolute immunity under 42 U.S.C. 1983, "[t]his Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law." 424 U.S. at 429; accord, *Mesa* v. *California*, 489 U.S. 121, 133 (1989). Similarly, in *United States* v. *Gillock*, 445 U.S. 360 (1980), the Court held that state legislators are not immune from federal criminal prosecution, even though they had been held to be immune from a private civil action under federal law.

The courts of appeals have reached similar conclusions. In *United States* v. *Diggs*, 613 F.2d 988, 1001 (1979), cert. denied, 446 U.S. 982 (1980), the D.C. Circuit held that a United States Representative could be prosecuted for offenses committed in the administration of his congressional office, "provided

that the government's case does not intrude into legislative processes or functions." And arguments by federal judges that they are immune from federal criminal prosecution were rejected in *United States* v. *Claiborne*, 765 F.2d 784, 789-790 (9th Cir. 1985), cert. denied, 475 U.S. 1120 (1986); *United States* v. *Hastings*, 681 F.2d 706, 710-712 (11th Cir. 1982), cert. denied, 459 U.S. 1203 (1983); and *United States* v. *Isaacs*, 493 F.2d 1124, 1144 (7th Cir.), cert. denied, 417 U.S. 976 (1974).

Petitioners' claim of immunity is weaker than those rejected in the foregoing cases, because petitioners did not occupy positions singled out by the Constitution or common law for special protection from civil suits. As chemical engineers who supervised research that generated substantial quantities of hazardous waste, petitioners' day-to-day tasks were functionally no different from those performed by their counterparts in private industry. Because the federal government is not exempt from RCRA's regulation of hazardous waste, petitioners have a duty under federal law to conform their official conduct to the substantive requirements of RCRA. Nor does this prosecution raise the federalism or separation-of-powers concerns that have shaped immunity doctrines in other contexts, since petitioners were employees of and were prosecuted by the Executive Branch.[4]

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[4] The discussion in the text demonstrates why petitioners err in relying (Pet. 37-46) on four inapposite lines of cases: (1) decisions concerning federal officials' immunity to civil suits for money damages (Pet. 37, 45-46, citing *Scherer* v. *Morrow*, 401 F.2d 204 (7th Cir. 1968), cert. denied, 393 U.S. 1084 (1969), and *Gregoire* v. *Biddle*, 177 F.2d 579 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950)); (2) decisions granting habeas corpus relief to federal officials held for

2. Petitioners' argument (Pet. 37-38) that Section 6001 of RCRA, 42 U.S.C. 6961, supports their claim of immunity is meritless. Section 6001 subjects federal agencies, including CRDEC, to all federal and state "requirements, both substantive and procedural * * *, respecting control and abatement of solid waste or hazardous waste disposal." This provision obligated petitioners, as agents of CRDEC, to respect the requirements of RCRA. Petitioners therefore cannot claim immunity on the ground that the substantive law they are charged with violating is preempted or otherwise inapplicable to their conduct. Compare *Mesa* v. *California*, 489 U.S. at 126-127; *In re Neagle*, 135 U.S. 1, 75 (1890).

To be sure, the courts of appeals that have addressed the issue have held that the waiver of *sovereign* immunity in Section 6001 stops short of subjecting federal agencies to criminal or civil penalties imposed under state law. *California* v. *Walters*, 751 F.2d 977 (9th Cir. 1985); *United States* v. *Washing-*

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criminal prosecution under *state* law for actions within the scope of their federal employment (Pet. 32, 46, citing *In re Neagle*, 135 U.S. 1 (1890), and *Morgan* v. *California*, 743 F.2d 728 (9th Cir. 1984)); (3) decisions dismissing suits against federal officials where the relief sought would effectively enjoin a federal agency (Pet. 45, citing *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), and *United States* v. *Yakima Tribal Court*, 794 F.2d 1402, 1407 (9th Cir. 1986), cert. denied, 481 U.S. 1069 (1987)); and (4) this Court's holding that the Eleventh Amendment bars federal courts from entertaining state-law claims for injunctive relief against state officials (Pet. 37, citing *Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89 (1984)). None of those cases supports a claim of immunity from *criminal* prosecution under a *federal* law that does not exclude federal employees from its generally applicable provisions.

ton, 872 F.2d 874, 878-879 (9th Cir. 1989); *Mitzelfelt* v. *United States*, 903 F.2d 1293, 1294-1295 (10th Cir. 1990); *Ohio* v. *U.S. Department of Energy*, 904 F.2d 1058, 1062-1064 (6th Cir. 1990).[5] None of those cases, however, suggests that the limitations on the waiver of sovereign immunity affect the personal liability under federal law of individuals employed by federal agencies. *California* v. *Walters*, on which petitioners principally rely (Pet. 38), held that Section 6001 does not waive sovereign immunity to a state criminal prosecution for violations of state restrictions on disposal of infectious wastes at a Veterans Administration hospital. The analysis of Section 6001 in *Walters* was expressly predicated on the parties' agreement that California's prosecution was "essentially against the United States," rather than the named officials as individuals. 751 F.2d at 979. Here, by contrast, the prosecution was brought by the United States, and was

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[5] But see *Maine* v. *Department of the Navy*, 702 F. Supp. 322 (D. Me. 1988), appeal pending, No. 91-1064 (1st Cir.). In *Ohio* v. *U.S. Department of Energy*, the Sixth Circuit held that although Section 6001 does not subject a federal agency to civil penalties, the citizen-suit provision of RCRA, Section 7002, 42 U.S.C. 6972, does accomplish that result. 904 F.2d at 1064-1065. (The Sixth Circuit also held that the Clean Water Act, 33 U.S.C. 1251 *et seq.*, waives the federal government's immunity to civil penalties under a state's water pollution laws. 904 F.2d at 1060-1062.) The Solicitor General has authorized the filing of a petition for a writ of certiorari to review the decision in *Ohio* v. *U.S. Department of Energy*, and the petition is due on February 22, 1991. Because the question of a federal agency's liability for civil penalties under Section 7002 of RCRA, presented in the *Ohio* case, is wholly distinct from the question of personal liability for criminal sanctions under Section 3008(d), presented here, there is no reason to hold the petition in this case pending the disposition of *Ohio* v. *U.S. Department of Energy*.

brought against petitioners as individuals. Nothing in Section 6001 contradicts RCRA's clear statement that such "individuals" are "persons" under Section 1004(15), and are therefore subject to criminal penalties under Section 3008(d)(2).

2. Petitioners also contend (Pet. 47-61) that the court of appeals erred in finding that the requisite "criminal intent" was established here. Section 3008 (d)(2) of RCRA, 42 U.S.C. 6928(d)(2), prescribes criminal penalties for any person who—

> knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter either—
>
> (A) without a permit under this subchapter or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S.C. 1411 et seq.]; or
>
> (B) in knowing violation of any material condition or requirement of such permit; or
>
> (C) in knowing violation of any material condition or requirement of any applicable interim status regulations or standards.

Two prior decisions under Section 3008(d)(2)(A) have divided on the question whether the government must prove that the defendant knew a permit was lacking. Compare *United States* v. *Hoflin*, 880 F.2d 1033, 1037 (9th Cir. 1989) (government need not establish knowledge that there was no permit), cert. denied, 110 S. Ct. 1143 (1990), with *United States* v. *Johnson & Towers, Inc.*, 741 F.2d 662, 668-670 (3d Cir. 1984) (jury must find that defendant was aware of both the permit requirement and the absence of a permit), cert. denied, 469 U.S. 1208 (1985). Although petitioners discuss (Pet. 53-55) *Johnson & Towers*, they do not join this precise dis-

pute, since they do not argue that their convictions should be reversed because the jury was not instructed that conviction required proof of knowledge that a permit was required but was lacking. And with good reason: the record shows that petitioners had considerable knowledge of the applicable regulatory requirements for handling hazardous wastes,[6] and petitioners concede (Pet. 60) that they "indeed were well aware of the APG regulations dealing with hazardous wastes." Nor did the court of appeals address the question decided in *Hoflin* and *Johnson & Towers*. In any event, this Court recently denied certiorari in *Hoflin*, which directly raised the

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[6] In early 1984, Dee received three memoranda from the Chief of CRDEC's Environmental Technology Division expressing concern that the hazardous waste inventory control and disposal procedures described in APG 200-1 and CRDC 710-1 (see page 3, *supra*) were not being complied with at CRDEC. Those memoranda included (1) directions to laboratory supervisors to review and comply with inventory and disposal requirements or "risk regulatory enforcement and controversy," C.A. App. 1221; (2) a warning that wastes covered by RCRA "must be disposed of under manifest to ensure RCRA compliance," *id.* at 1275; and (3) a directive (which included a list of RCRA hazardous substances) that Dee submit a list of hazardous wastes and estimated quantities generated by Pilot Plant operations, *id.* at 1295-1298. In reply to the first memorandum, which had been routed to him by Dee, Lentz represented that the regulations and operating procedures "were reviewed as requested," and attested that "[c]ompliance and implementation of the procedures are being complied with at [the Pilot Plant]." C.A. Supp. App. 489. Gepp drafted and signed off on Lentz's response to the first memorandum. *Id.* at 174-176. Gepp also responded to the request for a list of hazardous wastes generated at the Pilot Plant, falsely stating that the only RCRA hazardous waste generated by the Pilot Plant was o-cresol. C.A. App. 1294.

issue whether knowledge of the permit requirement and absence of a permit must be shown. There would be no reason for a different disposition here—even if petitioners did seek review on that issue and the court below had decided it.[7]

Petitioners instead argue for reversal of their convictions based on an asserted lack of evidence that they knew their violations entailed a risk of criminal sanctions. See Pet. 10-11, 60. The court of appeals correctly rejected that contention. Pet. App. xi-xvii.[8]

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[7] For the reasons stated in our brief in opposition in *Hoflin* (a copy of which we are furnishing to petitioners here), the Ninth Circuit correctly held in that case that the government need not show that the defendant knew that a permit was required but was lacking. The text of the statute establishes as much: although paragraphs (B) and (C) of Section 3008(d)(2) impose criminal penalties for conduct "in knowing violation" of a permit condition or certain regulations or standards, paragraph (A) imposes no similar requirement of knowledge that the treatment, storage, or disposal was without a permit.

[8] In the district court, petitioners proposed an instruction stating (C.A. App. 1407):

> It is not necessary for the prosecution to prove that a Defendant knew that a particular act or failure to act is a violation of the law. Unless and until outweighed by evidence in the case to the contrary, the presumption is that every person knows what the law forbids, and what the law requires to be done. However, evidence that the accused acted or failed to act because of ignorance of the law, is to be considered by the jury, in determining whether or not the accused acted or failed to act with a specific intent, as charged.

This proposed instruction is inconsistent with petitioners' subsequent argument that the government must show that they knew their conduct was a crime. Hence, although the government did not raise the point below, the court of appeals could have rejected that argument on the ground that it had been waived. Fed. R. Crim. P. 30.

It is a firmly rooted principle of criminal law that knowledge that the conduct in question is a crime is not an element of a criminal offense; it is in this respect that the maxim that "ignorance of the law is no excuse" carries particular force. Model Penal Code § 2.02(9) & n. (9) (1985); see, *e.g.*, *Liparota* v. *United States*, 471 U.S. 419, 425 n.9 (1985) ("It is not a defense to a charge of receipt of stolen goods that one did not know that such receipt was illegal, and it is not a defense to a charge of a [7 U.S.C.] § 2024(b)(1) violation that one did not know possessing food stamps in a manner unauthorized by statute or regulations was illegal.").

Nothing in the text or purposes of Section 3008(d) of RCRA suggests that it departs from the established rule that the prosecution need not show that the defendant knew his conduct was a crime. Indeed, Section 3008(d)(2)(A) is an especially unlikely candidate for such a novel rule. Under statutes involving highly regulated activities, this Court has held that the prosecution need not even prove knowledge of the regulatory requirements of the law, much less knowledge that failure to adhere to those requirements is a criminal offense. For example, in *United States* v. *International Minerals & Chem. Corp.*, 402 U.S. 558 (1971), the Court affirmed a conviction for violation of routing restrictions for trucks carrying dangerous cargoes. The statute at issue provided criminal sanctions for anyone who "knowingly violate[d] any regulation issued by the Interstate Commerce Commission." 18 U.S.C. 834(f). The Court read the term "knowingly" to indicate only that the crime was not a strict liability offense, and it found the knowledge element satisfied by a showing that the defendant knew that it was shipping a dangerous substance, rather than a harm-

less one. 402 U.S. at 563-564. This interpretation did not signal "an exception to the rule that ignorance of the law is no excuse" and was consistent with a general view that "where dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that any one who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation." *Id.* at 563, 565. Accord *United States* v. *Freed*, 401 U.S. 601, 607-610 (1971); *United States* v. *Balint*, 258 U.S. 250, 257 (1922).[9]

Petitioners contend (Pet. 48, 52-55) that the court below failed to acknowledge the more restrictive reading of the knowledge element of Section 3008 (d)(2)(A) in *Johnson & Towers*, 741 F.2d at 668-670. As we have explained (see page 16, *supra*), however, *Johnson & Towers* held only that in a prosecution under Section 3008(d)(2)(A), the government must show that the defendant knew both that a permit was required and that no permit had been obtained. 741 F.2d at 669-770. This holding stops far short of petitioners' position that the government must also establish that the defendant knew that his conduct was punishable as a criminal offense. In fact, *Johnson & Towers* quoted language

[9] The decision below also is consistent with decisions construing other criminal provisions of RCRA. See *United States* v. *Hayes Int'l Corp.*, 786 F.2d 1499, 1502-1503 (11th Cir. 1986) (government need not prove knowledge of illegality for conviction under 42 U.S.C. 6928(d)(1) for knowing transportation of waste to an unpermitted facility); *United States* v. *Protex Indus., Inc.*, 874 F.2d 740, 744 (10th Cir. 1989) ("knowing endangerment" offense, 42 U.S.C. 6928(e), requires proof only that defendant violated RCRA and knew that its actions placed others in great danger).

in *International Minerals* that is antithetical to petitioners' position, including its invocation of the maxim that "ignorance of the law is no excuse." 741 F.2d at 669 (quoting 402 U.S. at 563). The Fourth Circuit in this case cited that part of the *Johnson & Towers* opinion in rejecting petitioners' attempt to expand the knowledge element in Section 3008 (d)(2)(A) beyond the scope it was given in *Johnson & Towers*. See Pet. App. xiii.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[10] Petitioners Dee and Lenz also argue (Pet. 61) that their convictions should be reversed because the improper storage of chemicals at the Old Pilot Plant predated their employment at CRDEC and because a person cannot, in their view, "inherit" an environmental crime. This argument, as the court of appeals noted, "borders on the frivolous." Pet. App. at xxxi. Count Four charged Dee and Lentz with improper storage of hazardous wastes between June 1983 and August 1986. The existence of environmental problems at the Old Pilot Plant when Dee and Lentz assumed control does not diminish their culpability for their subsequent failure, over an extended period of time, to comply with RCRA.

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